CHANGES TO THE FEDERAL RULES ON DISCOVERY: OLD WINE IN NEW SKINS?

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The Need for Change to the Discovery Rules

• Consensus:
  • Discovery far too expensive
    • Dollar cost
    • Human cost
    • Investment in time
  • Discovery too difficult in the age of ESI
The Amendments to the Federal Discovery Rules

• Goal:
  • Streamlining discovery
    • More efficient
    • Less burdensome
    • Less expensive
The Amendments to the Federal Discovery Rules

• Core Concepts

  • Proportionality

• In the Federal Rules for more than 30 years
• Code word for reduced discovery
• Relevance or “lead to the discovery of admissible evidence” no longer rules
• Discovery must be tailored to the “proportionality factors” in Rule 26
The Amendments to the Federal Discovery Rules

• Core Concepts

• Attorney and Judicial Activism

• The Rules now contemplate that the parties and Court will meet early and often to chart the course of discovery
• Discovery rules take into account the parties’ resources, the availability of other sources of evidence, and that the parties will reassess discovery needs during the case
The Amendments to the Federal Discovery Rules

• Core Concepts

Questions and comments:

• Was discovery too expensive pre-amendment?
• Was discovery too difficult in light of ESI issues pre-amendment?
• Was there a real need to change the discovery rules?
• Will streamlining under amendments advance resolution?
• View from the bench.
The Amendments to the Federal Discovery Rules

• Rule 1: Courts and Parties Just, Speedy and Inexpensive Litigation

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, and administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.
The Amendments to the Federal Discovery Rules

• Rule 1: Courts and Parties: Just, Speedy and Inexpensive Litigation

• Emphasis that *Parties and Court* share responsibility to effectuate goals of Rules
The Amendments to the Federal Discovery Rules

- Rule 4m: Time Limit for Service
  - Shorten time to serve summons and complaint from 120 days to 90 days
  - Adopted to speed up cases
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• Rule 16(b): Scheduling Order

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order:

(A) after receiving the parties’ report under Rule 26(f); or

(B) after consulting with the parties’ attorneys and any unrepresented parties at a scheduling conference by telephone, mail, or other means.
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• Rule 16(b): Scheduling Order

(2) **Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in any event unless the judge finds good cause for delay, the judge must issue it within the earlier of 120 or 90 days after any defendant has been served with the complaint or 90 or 60 days after any defendant has appeared.
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• Rule 16(b): Scheduling Order

(3) Contents of the Order.

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(B)  *Permitted Contents.* The scheduling order may:

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(iii) provide for disclosure, or discovery, or preservation of electronically store information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

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The Amendments to the Federal Discovery Rules

• Rule 16(b): Scheduling Order

  • Shortens by 30-days the time to issue the scheduling order

  • Adds that scheduling order may direct parties before moving for discovery order to request court conference
The Amendments to the Federal Discovery Rules

• Rule 16(b): Scheduling Order

• Adds to possible contents of scheduling order provisions for preservation of ESI and agreements reached as to privileged material

• Committee Notes endorse live case management conference
The Amendments to the Federal Discovery Rules

• Rule 26(b)(1): Proportionality

**Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
The Amendments to the Federal Discovery Rules

• Rule 26(b)(1): Proportionality: Relevant, nonprivileged matter that is proportional to needs of the case, considering:
  • Importance of issues
  • Amount in controversy
  • Parties’ relative access to relevant information
  • Parties’ resources
  • Importance of discovery in resolving the issues
  • Whether burden of expense of the discovery outweighs its benefit

• No single factor is determinative
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• Rule 26(b)(1): Proportionality

  • The Importance of the Issues at Stake
    • Measure importance of the Issues at stake with regard to public and private interests
    • Constitutional and statutory Issues may implicate public concerns beyond damages at stake
      • Weigh in favor of increased discovery
      • Justify third party discovery
The Amendments to the Federal Discovery Rules

• Rule 26(b)(1): Proportionality

• The Amount in Controversy
  • Determined by amount plaintiff claims in good faith
  • Yardstick for determining whether discovery burdens and expenses are reasonable
  • Declaratory/equitable relief may be valued based on rights at stake
  • Amount in controversy may change as case proceeds
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• Rule 26(b)(1): Proportionality

• Relative Access to Information

• How much formal discovery does a party need?
• Party may already have access to information
• Addresses “information asymmetry”
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• Rule 26(b)(1): Proportionality

• Committee Notes recognize that a party with more information may produce more than it seeks
• Discovery costs and burdens should be considered
• Consider whether information may be obtained from other more convenient, less burdensome or less expensive source
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• Rule 26(b)(1): Proportionality

• The Parties’ Resources

• “Resources” means more than financial resources
• Includes technological, administrative and human resources
• “what resources a party reasonably has available to discovery, when it is needed”
The Amendments to the Federal Discovery Rules

• Rule 26(b)(1): Proportionality
  • Importance of Discovery
    • Parties identify the issues that are in need of discovery to resolve case
    • Describe the discovery
The Amendments to the Federal Discovery Rules

• Rule 26(b)(1): Proportionality

  • Whether the Burden/Expense Outweighs the Likely Benefit
    • Party in best position to discuss burdens, expenses or benefits should do so
    • Party objecting based on burdens should explain those burdens
    • Support with justifiable expenses
    • Requesting party specify how discovery will benefit case
The Amendments to the Federal Discovery Rules

• Rule 26(b)(1): Proportionality
  • Applying the Factors
    • No set standard or rules
    • Advance showing of proportionality not required
    • Early and active judicial participation
    • Early and active planning by the parties and the Court
    • Ongoing judicial management
    • Staged or progressive discovery
    • Pre-motion conferences, especially where proportionality is new standard and parties do not want to be subject to Rule 37 Sanctions
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• Rule 26(c): Cost Sharing

  • Court may shift cost of providing discovery to requesting party in a protective order
    • Changes burden
    • Linked to proportionality
    • If discovery cost clearly disproportionate or not relevant, not likely to get discovery even if requesting party pays
    • If it is a close call on proportionality, not clear whether requesting party willing to pay will obtain discovery
The Amendments to the Federal Discovery Rules

• Rule 26

• Practical Application (how has this worked) and a View From the Bench

• Examples:
  • Early actual discussion of discovery with judge
  • Staged or progressive discovery
  • Pre-motion conferences
The Amendments to the Federal Discovery Rules

• Rule 26(d)(2) and Rule 34(b)(2)(A): Early Document Requests and Case Management Conference

• Considered served at the Rule 26(f) conference if served prior to conference
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• Time to respond runs from service under Rule 34(b)(2)(A)
  • Respond 30-days from first Rule 26(f) conference if served under Rule 26(d)
  • Otherwise, respond within 30-days

• Facilitate focused discussion during Rule 26(f) conference
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• Rule 26(f): Discovery Plan Include ESI Preservation
  • Include any issues about preservation of ESI in discovery plan
  • Also include any agreements between the parties under Federal Rule of Evidence 502
The Amendments to the Federal Discovery Rules

• Rule 34(b): Requests for Production
  • Proportionality applies to responses to requests for production
  • Boilerplate proportionality objections will not be tolerated
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• Rule 34(b)(2)(B): Objections With Specificity; Time to Produce Documents

*Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.
• Rule 34(b)(2)(B): Objections With Specificity; Time to Produce Documents

• State inspection permitted or objections with specificity
• May produce copies of documents or ESI rather than permit inspection
• Identify reasonable date of production if not producing at time requested
The Amendments to the Federal Discovery Rules

• Rule 34(b)(2)(C): State in Responses Whether Documents Will be Withheld Based on Objections

*Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

• State whether documents are being withheld based on objections
• Enacted to alleviate confusion of what has and has not been produced
The Amendments to the Federal Discovery Rules

• Rule 37(e): Spoliation/Duty to Preserve

(e) **Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.
The Amendments to the Federal Discovery Rules

• Rule 37(e): Spoliation/Duty to Preserve

• 5 conditions must exist:
  • ESI;
  • Preserved in anticipation or conduct of litigation;
  • Lost;
  • Responding party failed to take reasonable steps to preserve the ESI; and
  • The ESI cannot be restored or replaced through other discovery.
The Amendments to the Federal Discovery Rules

• Rule 37(e): Spoliation/Duty to Preserve

• All conditions met and there is prejudice but no bad faith, remedial measures may be entered

• All conditions are met and party acted intentionally to deprive of ESI, then court may enter case altering sanctions:
  • Presume lost ESI was unfavorable;
  • Instruct jury that it may/must presume ESI unfavorable; or
  • Dismiss action/enter default judgment.
Application of the Amendments

• Judicial Decisions

• Some courts--broad discovery
• Some courts cite old definitions
• Some courts place the burden on the resisting party to show request is not proportional while others place on propounding party that the requests are proportional
Application of the Amendments

• Judicial Decisions:

  • *Dao v. Liberty Life Assurance Co. of Boston* (LaPorte, MJ)

    • Objection to document request on grounds that request was “overbroad as to time and scope, vague and ambiguous, burdensome and harassing, and seeks confidential, proprietary commercial information and/or trade secrets.”

    • The Court: Objection was “non-specific and boilerplate.”

    • Any ground not stated in a timely objection was waived unless excused by the Court.

• Staged Discovery: Issues subject to a dispositive motion could be deferred pending resolution of the motion.
Application of the Amendments

• Judicial Decisions:

• *Areizaga v. ADW Corp.*
  
  • Proportionality objection must be specific and party must demonstrate that the discovery is not warranted.

• *Steel Erectors, Inc. v. Aim Steel, Int’l.*
  
  • Interrogatory response stating parent corporation had no involvement with construction project cut off further discovery regarding parent-child relationship as disproportional.
Application of the Amendments

• Franchise Decisions

*Salazar v. McDonald’s Corp.*

• Plaintiff’s bid to delay ESI discovery until after Plaintiff’s deposition rejected

• Court found no efficiency and a risk of greater costs if Plaintiff had to be deposed twice.
Application of the Amendments

- Franchise Decisions: *Noble Roman’s Inc. v. Hattenhauer Distributing Co.*

  - Franchisor sought unpaid royalties and trademark relief; franchisee counterclaimed for breach, arguing that franchisor’s audits were unauthorized and defective.

  - Franchisee sought wide ranging discovery on audit issues from franchisor’s largest shareholder.

  - Franchisor argued materials were not relevant or were available from other sources; discovery from shareholder would not advance case.
Application of the Amendments

• Franchise Decisions: Noble Roman’s Inc. v. Hattenhauer Distributing Co. (continued)

• Held:

• Franchisor required to produce a sampling of audit materials.

• Although requests were relevant, franchisee failed to show how they were proportional to needs of the case and denied relief.
Approaches of Various Courts

• Utah: Burden on proponent; discovery tiers; self-executing provisions.

• Western District of Washington: Local Rules require application of proportionality, require it to be addressed in status report and provide expedited Rule 37 procedures.

• Eastern and Western District of New York: Pre-motion letters.
Application of Amendments to Franchise Cases

• Are there categories of documents that could be produced automatically in most cases?

• Do franchisor’s email systems offer a simple way of obtaining access to documents?

• What are the implications of POS systems that share franchisee data with the franchisor in real time?
Application of Amendments to Franchise Cases

A View From the Bench

• Will the amendments make a difference?

• Or, are they simply old wine in new skins?
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Questions?